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January 10, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Written Ex Parte Communication
2002 Biennial Review Proceedings
WC Docket No. 02-313; WT Docket No. 02-310

Dear Ms. Dortch:

This letter is filed on behalf of ALLTEL Communications, Inc., ("ALLTEL"); AT&T Wireless Services, Inc. ("AWS"); Dobson Communications Corporation ("Dobson"); and Cingular Wireless LLC ("Cingular"), to bring the Commission's attention to the urgent need to review the Commercial Mobile Radio Service ("CMRS") local number portability ("LNP") requirements[1] in the context of the above-referenced 2002 Biennial Review proceedings.[2]

The parties to this letter are also intervenors in the D.C. Circuit appeal of the Commission's decision not to forbear from the CMRS LNP requirement.[3] In that case, the intervenors have drawn the Court's attention to: (1) the Commission's lack of jurisdiction to adopt the CMRS LNP requirement in the first instance, and (2) the Commission's repeated failure to subject the CMRS LNP requirement to the biennial review required by section 11.[4] A copy of the intervenors' brief is attached hereto and incorporated by reference. Briefing of

[1] The CMRS LNP rule is codified at 47 C.F.R. § 52.31. Related, uncodified requirements (for example, the requirement to provide LNP upon carrier request outside the largest 100 MSAs) can be found in various orders in CC Docket Nos. 95-116 and 99-200.

[2] *See also* Cellular Telecommunications & Internet Ass'n Petition for Rulemaking Concurring the Biennial Review of Regulations Affecting CMRS Carriers, WT Docket No. 02-310 (filed July 25, 2002); Sprint Reply Comments, WT Docket No. 02-310 (filed Nov. 4, 2002).

[3] *Cellular Telecommunications & Internet Ass'n and Cellco Partnership d/b/a Verizon Wireless v. FCC*, Case No. 02-1264 (D.C. Cir. pending), seeking review of *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, Memorandum Opinion & Order, 17 FCC Rcd 14972 (2002) ("*Order Denying Forbearance*").

[4] Intervenors also demonstrate that the FCC violated section 10 by ignoring most of the record and applicable standards in denying Verizon's forbearance petition.

this case will be complete on February 24, 2003, and oral argument is scheduled for April 15, 2003.

The jurisdictional argument is in large part based on a recent case, *MPAA v. FCC*,[5] which holds that where Congress intentionally limits the agency's authority in a particular area, ancillary authority cannot be utilized to subvert the limitation – Congress has "filled the hole," leaving no room for agency action. The same principle applies here in light of the specificity of section 251 and its limitation on applying LNP only to LECs.

Given the obvious overlap of issues, the Commission cannot ignore review of section 52.31 in its 2002 biennial review. If the FCC lacked jurisdiction to impose the rule in the first place, then it is not possible to find the rule "necessary" because Congress obviously reached a different conclusion – it limited the FCC's authority to impose it on CMRS carriers. Congress's decision not to delegate authority to the Commission to require CMRS carriers to provide LNP was based on an analysis of the same market factors to be considered under section 11. Moreover, to date, the rule has never been subjected to a biennial review. Section 11 contains no exception for rules that have undergone section 10 forbearance review. In any event, as demonstrated in the intervenors' brief, that review has been superficial at best.

Because substantial questions have been raised about the Commission's jurisdiction, and whether it has complied with section 11 (and section 10), and important LNP rules have not yet even been clarified even though the deadline is rapidly approaching,[6] the Commission should review the CMRS LNP requirement now.

I. The FCC Lacked Jurisdiction to Adopt the CMRS LNP Requirement

An agency has no power to act without a delegation by Congress;[7] it possesses only those powers *granted* by Congress. Stated another way, an agency does not possess all powers *except those forbidden* by Congress – otherwise agencies would have virtually limitless discretion in violation of *Chevron* and the Constitution.[8] In *MPAA*, the D.C. Circuit found that the FCC

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[5] *Motion Picture Ass'n v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (*pet. reh'g. pending*) ("*MPAA*").

[6] For example, whether the FCC will retain the request requirement for LNP.

[7] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Stark v. Wickard*, 321 U.S. 288, 309 (1944); *MPAA*, 309 F.3d at 801.

[8] *MPAA*, 309 F.3d at 805-06; *Railway Labor Exec Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 665, 670-71 (D.C. Cir. 1994) ("*Railway*").

cannot adopt rules simply because Congress "did not expressly foreclose the possibility"[9] of such a rule, especially where Congress left no hole "for the agency to fill."[10]

With respect to LNP, section 251 of the Act is the starting point for analyzing the LNP requirement because it is the sole statutory provision addressing LNP.[11] Congress not only confined the delegation to the specific requirement (LNP), but also took the next step by limiting the carrier class to which it applies.

Section 251 is the only section in the Act dealing with numbering in general and LNP specifically. Therefore, the FCC is empowered to require LNP only to the extent specified in section 251. That section references all telecommunications carriers (including CMRS providers), LECs and incumbent LECs, and delineates which entities are required to provide LNP. "Statutory provisions *in pari materia* normally are construed together to discern their meaning."[12] Accordingly, the various provisions of section 251, construed together, establish the scope of the Commission's power to require LNP.

Sections 251(a)-(c) set forth a "carefully-calibrated regulatory regime crafted by Congress," with a "three-tiered hierarchy of escalating obligations based on the type of carrier involved."[13] Subsection (a) sets forth the relatively limited duties applicable to all telecommunications carriers, but is silent regarding LNP. Subsection (b) imposes five separate obligations, including LNP, *applicable only to LECs*, and gives the Commission LNP standard-setting authority. At the same time, Congress defined LECs to *exclude* CMRS carriers unless and until the FCC determines otherwise,[14] a finding the FCC has repeatedly and correctly declined to make.[15] Section 251(c) imposes additional requirements on *incumbent* LECs.

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[9] *MPAA*, 309 F.3d at 805-06; *see also Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998) ("[A]gency power is 'not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)), *aff'd*, 529 U.S. 120 (2000).

[10] *MPAA*, 309 F.3d at 801 (citing *Railway*, 29 F.3d at 671; *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1994)).

[11] *MPAA*, 309 F.3d at 801 (citing *Railway*, 29 F.3d at 671; *Chevron*, 467 U.S. at 843-44).

[12] *MPAA*, 309 F.3d at 801 (*citing Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972)).

[13] *Guam Public Utilities Commission*, 12 FCC.Rcd 6925, 6937-38 (1997).

[14] 47 U.S.C. § 153(26) (The term "local exchange carrier" . . . does *not* include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term) (emphasis added).

[15] *See Order Denying Forbearance*, 17 FCC Rcd at 14972-73 ("Commercial Mobile Radio Service (CMRS) carriers are not LECs, and thus are not included in section 251(b) . . . ."); *Petition of the State Independence Alliance for a*

Moreover, in contrast to the limited authority to impose LNP in subsection (b), section 251(e) gives the FCC plenary authority over numbering administration. Thus, it is clear Congress knew how to include and exclude CMRS carriers regarding LNP and to define the FCC's jurisdiction narrowly (LNP) or broadly (numbering administration) as it deemed appropriate. It reviewed the competitive landscape and decided LNP should be required only of LECs.

The exclusion of carriers other than LECs from LNP requirements and other section 251 requirements reflects a deliberate choice by Congress, negating any implied power of the Commission to choose otherwise. As the Supreme Court has held, "an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance."[16] Here, Congress intended to confine the LNP requirement to LECs.

The FCC recognized in implementing section 251 that the statute withdrew authority to impose LNP on wireless carriers:

> The statute . . . *explicitly excludes* commercial mobile service providers from the definition of local exchange carrier, and therefore from the section 251(b) obligation to provide number portability, unless the Commission concludes that they should be included in the definition of local exchange carrier.[17]

In the same breath, however, the Commission found "independent authority" to require wireless LNP "as we deem appropriate" from the general delegations in sections 1, 2, 4(i), and 332 of the Act.[18] These provisions do not mention LNP, nor can they serve as a jurisdictional basis to override the specific reservations in section 251.

Declaratory Ruling, 17 FCC Rcd 14802, 14806 (2002) ("CMRS providers are not subject to the statutory requirements imposed on LECs in section 251(b)."); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15996 (1996) (stating that the FCC will not define CMRS providers as LECs absent evidence that wireless services "replace wireline loops for the provision of local exchange service.") (subsequent history omitted); *Administration of the North American Numbering Plan Carrier Identification Codes*, 13 FCC Rcd 3201, 3206 n.21 (1998) (noting that CMRS providers "are not classified as LECs").

[16] *Field v. Mans*, 516 U.S. 59, 67 (1995).

[17] *LNP First Report*, 11 FCC Rcd at 8431 (emphasis added).

[18] *Id*. at 8431-32. The *Order Denying Forbearance* references the *LNP First Report* where, in response to challenges by Petitioners and others, the FCC fully addressed its implied authority to require wireless LNP. *See Order Denying Forbearance*, 17 FCC Rcd at 14972 & n.3.

Reliance on these provisions is barred by the canon of statutory construction that "the specific governs the general."[19] This canon is "a warning against applying a general provision *when doing so would undermine limitations created by a more specific provision.*"[20] Congress spoke comprehensively and specifically to LNP in section 251(b). Thus, the FCC cannot rely on general powers conferred by sections 1, 2, 4(i) and 332 to negate Congress' contrary directive. The separate statement of Commissioner Furchtgott-Roth in the *2000 Forbearance Reconsideration Order* aptly observes:

> The Commission has grounded its [wireless LNP] authority in sections 1, 2, 4(i), and 332 of the Communications Act. I have long voiced concern about this agency's efforts to impose costly and far-reaching regulatory obligations based on authority cobbled together from various general and ancillary provisions of the Act. Such assertions of jurisdiction are particularly troubling here in light of section 251's statutory provision specifically mandating number portability solely for local exchange carriers.[21]

Nor do these sections grant the Commission independent jurisdiction to impose LNP requirements on CMRS providers. As the Court recognized in *MPAA*, the FCC has "necessary and proper" authority only where another provision contains a specific delegation of authority.[22]

Section 1 constitutes a general delegation of authority to the Commission and never mentions LNP.[23] It grants the Commission only such limited authority as is "reasonably ancillary to the effective performance of the Commission's various responsibilities."[24] Courts have upheld the FCC's exercise of ancillary jurisdiction in cases where (1) Congress did *not* expressly address and define the scope of the Commission's authority with respect to the regulated area at issue, and (2) there was a demonstrated need to imply authority to discharge the

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[19] *Morales v. Transworld AirLines,* 504 U.S. 374, 384-385 (1992) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc*., 482 U.S. 437, 445 (1987)).

[20] *Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996) (emphasis added).

[21] *Telephone Number Portability, Cellular Telecommunication and Industry Association's Petition for Forbearance, Order on Reconsideration*, 15 FCC Rcd 4727, 4739 (2000) (*2000 Forbearance Reconsideration Order*) (Separate Statement of Commissioner Furchtgott-Roth).

[22] *MPAA*, 309 F.3d at 806.

[23] *Cf.* 47 U.S.C. § 151.

[24] *United States v. Southwestern Cable Co*., 392 U.S. 157, 178 (1968); *see also California v. FCC*, 905 F.2d 1217, 1240-41 & n.35 (9th Cir. 1990).

will of Congress.[25] Here, however, Congress has clearly expressed its will regarding LNP in section 251(b) and thus there is no basis to invoke ancillary authority under section 1.

In fact, the D.C. Circuit recently found that section 1 was enacted to ensure that all Americans "have access to wire and radio communication transmissions" and the mandate is a "reference to the geographic availability of service."[26] LNP, however, does not deal with access to service in a particular area. It is a service feature provided to a subscriber who already *has* service.

Finally, section 332 cannot serve as authority for the FCC to impose a wireless LNP mandate. This section requires the Commission to treat CMRS providers as common carriers but permits the FCC to forbear from certain statutory requirements normally associated with landline service, *e.g.*, tariffs.[27] It also preempts state regulation over wireless rates and market entry.[28] The main objectives of section 332 are regulatory parity among like wireless services and deregulation.[29] Thus, as the FCC has recognized:

> Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.[30]

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[25] *See, e.g., Southwestern Cable*, 392 U.S. at 164-78 (upholding FCC authority to regulate cable where there were no preexisting statutory provisions regarding FCC oversight of the cable industry and the FCC demonstrated a need to regulate flowing from its broadcast responsibilities).

[26] *MPAA*, 309 F.3d at 804.

[27] *See* 47 U.S.C. § 332(c)(1)(A). Under the Act and the Commission's rules, a "common carrier" is not the same as a "LEC." "Common carrier" is a broad category of entities that offer services to the public, while "LEC" includes only carriers that offer service within, and access to, a telephone exchange network.

[28] *See id.* § 332(c)(3)(A).

[29] *See* H.R. Rep. No. 103-111, at 259-60 (1993) (emphasizing the purpose of section 332 to achieve "regulatory parity" among providers of "equivalent mobile services"); *Petition of the Connecticut Department of Public Utility Control*, 10 FCC Rcd 7025, 7030-31 (1995) ("*Connecticut DPUC*") (recognizing that section 332 expresses a "general preference in favor of reliance on market forces rather than regulation," and "places on [the FCC] the burden of demonstrating that continued regulation will promote competitive market conditions"), *aff'd sub nom. Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2nd Cir. 1996).

[30] *Connecticut DPUC*, 10 FCC Rcd at 7035 (1995); *see also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 7992 (1994) ("[C]onsumer demand, not regulatory decree, [should] dictate[] the course of the mobile services marketplace.").

No showing can (nor has) been made that imposing wireless LNP is needed to carry out the objectives of section 332.

Because the FCC lacked delegated authority to impose LNP on wireless carriers, the Commission has the obligation in the 2002 Biennial Review proceeding to review and repeal the wireless LNP rule.

II. Section 11 Has Been Violated Because The CMRS LNP Rule Has Never Been Subjected to a Biennial Review and, in Any Event, Cannot Withstand Section 11 Analysis

Congress, in section 11 of the 1996 Act, commanded that the FCC "shall" review biennially "all regulations."

> In every even-numbered year (beginning with 1998), the Commission (1) shall review all regulations issued under this chapter in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and (2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.[31]

Despite the clarity of this statutory directive, the FCC has *never* conducted a biennial review of its wireless LNP rule. It did not conduct such a review in its 1998 biennial review, nor did it do so in 2000.[32]

Had the FCC conducted the required section 11 review of its number portability rule, it would have been compelled to eliminate the rule. Section 11 requires the FCC to repeal "all regulations" that it finds are "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[33] The FCC has already determined that, for purposes of section 11, "there is meaningful economic competition in CMRS mobile telephony generally":

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[31] 47 U.S.C. § 161(a).

[32] The FCC was specifically asked in the 2002 LNP forbearance proceeding to conduct a section 11 analysis, yet it ignored this request. *See, e.g.*, VoiceStream Wireless/U.S. Cellular Joint Reply Comments (WT Docket No. 01-184) at 11-13 (Oct. 22, 2001).

[33] 47 U.S.C. §§ 161(a)(2). *See also id.* at § 161(b) ("The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.").

> Evidence in MSAs [Metropolitan Statistical Areas] regarding the current state of these [wireless] markets clearly shows that the presence of multiple competitors is effectively restraining prices, promoting innovation and diversity, and increasing output.[34]

Indeed, Chairman Powell has observed that by "any standard," the CMRS market is "the most competitive market in the communications industry."[35]

There can be no question that the number portability requirement is not "necessary in the public interest" given this significant economic competition. Number portability is not "necessary" to promote competition between wireless carriers – a market the FCC has recognized already exhibits "a high level of competition for most consumers."[36] According to the FCC's own data:

- Eighty percent (80%) of the U.S. population lives in counties with five or more wireless carriers (with 53% of the population having a choice of at least six providers).[37]
- The Cellular Price Index (maintained by Bureau of Labor Statistics) has declined "almost 33 percent since the end of 1997."[38]
- "[M]ore than 30 percent of subscribers change service providers each year."[39]

According to FCC data, there were over 128 million mobile customers at the end of 2001.[40] If "more than 30 percent of subscribers change service providers each year," then more than 41 million mobile customers switched carriers during 2001 alone. Thus, number portability cannot possibility be considered "necessary" to facilitate competition among wireless carriers.

Nor can it be said that number portability is "necessary" to promote competition between wireless and landline services, the second reason the FCC has cited for its mandate. In the *Order*

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[34] *2000 Biennial Regulatory Review – Spectrum Aggregation Limits*, 16 FCC Rcd 22668, 22693 ¶ 46 (2001).

[35] *Id*. at 22727 (Separate Statement of Chairman Powell).

[36] *Seventh CMRS Annual Competition Report*, 17 FCC Rcd 12985, 13004 (2002).

[37] *See id*. at 12990-91.

[38] *Id*. at 13014.

[39] *Id*. at 13008.

[40] *See id*. at 13006.

Denying Forbearance, the FCC opined (without the recitation of a single fact or market study) that:

> [a]s more consumers choose to use wireless instead of wireline services, the inability to transfer their wireline number to a wireless service provider *may* slow the adoption of wireless by those consumers that wish to keep the same telephone number they had with their wireline service provider."[41]

The FCC does not provide a single fact to support the proposition that its regulatory mandate "may" increase wireless-LEC competition. In fact, the wireless LNP mandate will have the perverse effect of inhibiting competition between wireless and landline carriers. The FCC has recognized that wireless services will not compete meaningfully with landline services until wireless carriers offer a value proposition similar to landline carriers, including prices and service quality (ubiquity of coverage).[42] Number portability would increase a wireless carrier's cost structure, which, in turn, adversely affects its pricing. In addition, number portability diverts the capital dollars wireless carriers need to expand the coverage of their network and improve their service quality. As a result, LNP undermines the very capabilities wireless carriers need to compete directly with landline carriers.

Moreover, the FCC has never explained why existing mobile customers would want to port their landline telephone numbers to wireless service when the customers already have mobile telephone numbers. According to the FCC's own data, 45% of the U.S. population (counting all individuals, not just households) already subscribes to wireless service.[43] And, the *Order Denying Forbearance* neglects to note that wireless carriers could (and would) deploy number portability (without a government mandate) if they believed that the costs of the capability would be outweighed by the benefits of obtaining new customers who want to port their landline telephone number. That wireless carriers have not done so constitutes powerful evidence that landline customers are not demanding to have the capability of porting their telephone number to wireless services. Finally, the FCC should consider the concerns raised by the public safety community about the impact of LNP on E-911 and emergency response.[44]

In sum, the FCC has already determined that "meaningful economic competition" exists in the wireless market, and the LNP rule is not "necessary in the public interest" given this

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[41] Order at 14981 ¶ 18 (emphasis added).

[42] *See, e.g., First CMRS Competition Report*, 10 FCC Rcd 8844, 8869 ¶ 75 (1995); *Second CMRS Competition Report*, 12 FCC Rcd 11266, 11323-26 (1997).

[43] *See Seventh CMRS Competition Report*, 17 FCC Rcd at 13017.

[44] *See* Ex parte letter of NENA, APCO and NANSA, WT Docket No. 01-184 (filed May 1, 2001).

competition. Accordingly, section 11 requires that the FCC repeal its number portability rule as applied to wireless carriers.

Conclusion

The CMRS LNP rule was beyond the Commission's authority from the outset, and is not necessary in the public interest given the robust competition in the CMRS marketplace. The significant questions about the FCC's jurisdiction to adopt the CMRS LNP rule, Congress's statutory judgment that LNP should not be imposed on CMRS carriers in section 251, and the rule's validity under the section 11 criteria, combined with the substantial carrier costs as well as other resource expenditures and unintended consequences from imposition of wireless LNP,[45] militate strongly in favor of a thorough section 11 analysis now.

The FCC also should waste no time completing this process. Under the statute, the FCC is required to "review" its regulations *and* "determine" whether they are still necessary in competitive markets *during each even-numbered year.*[46] The year 2002 has now concluded without the determination that the statute requires.

Sincerely yours,

WILKINSON BARKER KNAUER, LLP

By: /s/
L. Andrew Tollin
L. Charles Keller
J. Wade Lindsay

[45] It is not clear that the full impact of LNP on national security and homeland security has been analyzed.

[46] 47 U.S.C. § 161(a).